



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
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WASHINGTON DC 20350-1000

AUG 13 1996

MEMORANDUM FOR DISTRIBUTION

Subj : FAR 33.103; PROTESTS TO THE AGENCY

By Executive Order (E.O.) 12979 of 25 October 1995, the President directed the heads of executive departments and agencies to prescribe administrative procedures for the resolution of procurement protests as an alternative to protests to outside fora. This direction was incorporated into FAR 33.103 as one of the items included in FAC 90-40, which was published in the Federal Register on 26 July 1996. A copy of the pertinent section of the Federal Register notice is enclosed for your information.

Pending issuance of DoD or DoN-wide implementing guidance, DON activities should utilize agency protest procedures that are consistent with the overriding objective of the Executive Order; namely, to provide interested parties with a procedurally simple and relatively quick mechanism for having their concerns regarding Federal procurements considered in a fair and impartial manner. In that regard, the FAR coverage states that interested parties may request a review at a level above the contracting officer. It also states that, pending protest resolution, the contracting officer shall not award a contract if a protest is received prior to award or shall immediately suspend performance if a protest is received within specified times after award, unless award or continued performance is justified in writing and approved at a level above the contracting officer.

Within the Navy, these objectives will be implemented as follows. First, "a level above the contracting officer," shall mean, for purposes of FAR 33.103(d) (4) and 33.103(f), the Chief of the Contracting Office or, if the Chief of the Contracting Office is less than two levels higher than the contracting officer, the Chief of the next higher Contracting Office. An individual so designated who has been personally and substantially involved with the procurement shall recuse him or herself and, instead, refer the matter to another appropriate DoN official at a comparable or higher level. Additionally, activities should ensure that bidders/offerors are advised by appropriate means, including, where feasible, notice in solicitations, how, or to whom, interested parties should submit agency protests and how such protests will be processed.

In anticipation of requests for statistical information related to implementation of E.O. 12979, and until notified otherwise, you are requested to maintain the agency protest information identified on the attached list.

Elliott B. Branch

Elliott B. Branch
Executive Director
Acquisition and Business
Management

AGENCY PROTEST INFORMATION
TO BE MAINTAINED BY DON HCA ACTIVITIES

1. Number of agency protests received
2. Number of agency protests reviewed at a level above the contracting officer
3. Number of agency protests decided in favor of the protester or for which some form of corrective action was taken by the contracting activity
4. Number of agency protests appealed to GAO and number of such GAO protests decided in favor of the protester
5. Estimated number of GAO protests avoided because protests to the agency submitted instead

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 33

[FAC 91340, FAR Case 95-309, Item XIII]

RIN 9000-AH10

Federal Acquisition Regulation; Agency Procurement Protests

AGENCIES: Department of Defense (DOD) , General Services Administration
(GSA) , and National Aeronautics and Space Administration (NASA) .

ACTION: Interim rule with request for comment.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to an interim rule amending the Federal Acquisition Regulation (FAR) to provide for informal, procedurally simple, and inexpensive resolution of protests. This interim rule implements Executive Order 12979 which was signed by the President on October 25, 1995. This regulatory action **was** not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

DATES: Effective Date: July 26, 1996.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before September 24, 1996 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR) , 18th & F Streets, NW., Room 4035, Attn: Ms. Beverly Fayson, Washington, DC 20405.

Please cite **FAC 9040**, FAR case 95-309, in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Jack O'Neill at (202) 501-3856 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite **FAC 9040**, FAR case 95-309.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule revises the agency procurement protest procedures

ENCLOSURE()

at "FAR 33.103 to implement Executive Order 12979 of October 25, 1995, Agency Procurement Protests (60 FR 55171, October 27, 1995).

B. Regulatory Flexibility Act

The interim rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., because it provides for a simpler, less expensive means of resolving agency protests. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite 5 U.S.C. 601, et seq. (FAC 90-40, FAR Case 95-309) , in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary in order to implement Executive Order 12979, Agency Procurement Protests, which required incorporation of its policies into the Federal Acquisition Regulation by April 22, 1996. However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Part 33

Government procurement.

Dated: July 16, 1996.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR part 33 is amended as set forth below:

PART 33--PROTESTS, DISPUTES AND APPEALS

1. The authority citation for 48 CFR part 33 continues to read as follows:

Authority: 40 U.S.C. 486(c) ; 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c) .

2. section 33.103 is revised to read as follows:

33.103 Protests to the agency.

(a) Reference. Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests.

(b) Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

(c) The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate and permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

(d) The following procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:

(1) Protests shall be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d) (2) of this section may be grounds for dismissal of the protest.

(2) Protests shall include the following information:

(i) **Name**, address, fax number, and telephone number of the protester.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(3) All protests filed directly with the agency will be addressed to the

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contracting officer or other official designated to receive protests.

(4) Interested parties may request an independent review at a level above the contracting officer, of any decision by the contracting officer that is alleged to have violated a statute or regulation and thereby caused prejudice to the offeror. This independent review need not be established within the contracting officer's supervisory chain.

(e) Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other **cases**, protests shall be filed no later than 14 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

(f) Action upon receipt of protest. (1) Upon receipt of a protest before award, a contract may not be awarded, pending resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(2) If award is withheld pending resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for

resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to "paragraph (f) (1) of this section.

(3) Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.1004, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed.

(h) Agency protest decisions shall be well-reasoned, and shall provide sufficient factual detail explaining the agency position. A copy of the written protest decision shall be furnished to the protester. A method that provides evidence of receipt should be used.

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